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No. 92-385

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

RUTH E. OSCAR and CHARLES SPINOSA,
Petitioners,

VS.

UNIVERSITY STUDENTS CO-OPERATIVE ASSOCIATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether or not a person can sustain "RICO" type injury within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 as the proximate result of unlawful conduct where:

A. The petitioners are: (1) a tenant for an undisclosed term for an undisclosed rent under an undefined lease in an apartment building; and (2) a former tenant in the same building whose former tenancy is similarly undefined and undisclosed, but who continues to rent a carport under undisclosed circumstances and conditions;

B. The unlawful conduct occurs in a neighboring building by undisclosed persons and is not directed at or intended to cause any harm to the petitioners; and

C. Neither petitioner alleges any direct, concrete financial damage.

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STATEMENT OF THE CASE

The opinion of the court of appeals is based upon a pleading record. Neither petitioner[1] has appended the third amended complaint which was the basis for the opinion of the court of appeals. The district court dismissed the Third Amended Complaint for failure to state a claim under RICO and petitioners declined to amend.[2] Instead, the petitioners acknowledged that their fourth attempt to allege a RICO claim was their best possible effort to plead injury to their business or property and proximate causation, and they appealed.

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[1] Petitioners Ruth E. Oscar and Charles Spinosa have filed separate petitions. We shall refer to them collectively as "petitioners" unless otherwise specified.

[2] Oscar Pet. 4a, 8a.

Petitioners' allegations of injury to business or property and proximate causation in their third amended complaint are as follows:

> 52. Plaintiffs were injured by defendant in the quiet enjoyment of their leasehold interests. That right of possession is a property right within the meaning of 18 U.S.C. Section 1964. Further, defendant's conduct did not result in plaintiffs paying less rent, because plaintiffs' rents were determined by rent control. Plaintiffs are entitled to recover for decrease in the value of their property caused by defendant's racketeering.
>
> 53. A reasonable person would have reduced desire to rent plaintiffs' apartments because the person would not want to live next door to drug racketeering enterprises and takes that into account when the person makes a decision to lease residential real property. Consequently the drug racketeering alleged in this complaint, which was widely known in the general community, of itself negatively affected the value of the plaintiffs' property interest in their apartments.
>
> 54. A reasonable person would have reduced desire to rent plaintiffs' apartments because of burglary and violence which a reasonable person associates with drug racketeering enterprises and their customers. Consequently the drug racketeering alleged in this complaint proximately negatively affected the value of the plaintiffs' property interest in their apartments through violence, burglary, and the fear of violence and burglary. [Petitioners did not allege that respondent was directly or indirectly responsible for any acts of violence or burglary in their apartment building or carport.]
>
> 55. . . . The drug enterprises thereby lowered the value of plaintiffs' apartments and interfered with plaintiffs' quiet enjoyment of that property.
>
> 56. The racketeering enterprises proximately caused continuing filth, risk of disease, and noise which adversely affected the value of plaintiffs' property. . . .

57. Plaintiffs are entitled to $50,000 for injury to their property, together with treble damages.[3]

Petitioners do not allege any effort to sublet their apartments and carport, they do not allege that they ever intended to do so and they do not allege they were even empowered to do so by the terms of their leases.[4] In fact, they never alleged *any* relevant terms of their leases.

REASONS FOR DENYING THE WRIT

The petitions do not report that the decision of the court of appeals is in conflict with the decision of another court of appeals on the same matter, that the court of appeals has decided a federal question in a way in conflict with a state court of last resort, or that the court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure, as to call for the exercise of this Court's power of supervision. Instead, they urge review because petitioners believe the *en banc* decision of the court of appeals was simply wrong. At the same time, they cite no contrary direct authority of this or any other court.

Petitioners fail to recognize that there are two components to a RICO claim: racketeering conduct *and* RICO type injury. They proceed on the apparent assumption that the severity of the first element eviscerates the necessity of the second. No court has ever recognized such a rule of statutory construction and petitioners have referred us to none.

The petitions before this court proceed on a basic misconception: that interference with an individual's personal, noncommercial, non-financial peace of mind and peace and quiet, constitutes "injury to business or property" within the meaning of 18 U.S.C. § 1964(c). The short answer to this contention is that there are no reported decisions of this or any other court supporting petitioners' claims.

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[3] Petitioners' excerpt of record Tab 12.

[4] Oscar Pet. 26a-27a.

The *en banc* opinion of the Ninth Circuit succinctly noted the restrictive scope of the phrase "business or property":

> RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff. Requiring that a plaintiff demonstrate a financial loss to her business or property is consistent with that purpose. It is also consistent with what the Supreme Court has termed the "restrictive significance" of the phrase "injured in his business or property." *Reiter [v. Sonotone Corp.]*, 442 U.S. [330,] 339 [(1979)].

Oscar Pet. 25a.

Petitioners take no issue with the observation of the court of appeals that petitioners have totally failed to allege any direct financial injury because of the alleged racketeering activity. Oscar Pet. 26a-27a. Petitioners have not alleged out-of-pocket expenses of any kind which were allegedly caused, directly or indirectly, by any activity of respondent. Since they do not allege that they have a right to sublet their apartments or carport, or that either of them ever did so, attempted to do so, or even wanted to sublet them, "Any supposed loss is therefore purely speculative." *Id.* 27a. In addition, petitioners have never explained the effect of the local rent control ordinance in Berkeley, California, mentioned in paragraph 52 of the complaint, on their alleged "damage to business or property." In sum, petitioners have never been able to specifically explain their "injury" in such a way that it might be quantified.

It bears noting that the Spinosa petition specifically advised this Court that he "suffered no special financial injury of the sort the court below describes and that rent control prevented him from alienating his leasehold at a profit or loss."[5] Moreover, petitioners simply are unable to establish financial injury because the unlawful conduct of which they complain began long before they moved into their apartments and carport. As noted by the court of appeals:

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[5] Spinosa Pet. 9.

> Oscar thus has not *lost* anything; what she really means is that she *has never had* as much use and enjoyment of her property as she believes she is entitled to. This is yet another step removed from financial loss. [emphasis from tex][6]

No matter how petitioners have attempted to recast their RICO claim, it amounts to no more than interference with their quiet enjoyment of their rental apartments and carport. The court of appeals noted that this does not represent a concrete financial loss (though it may constitute injury to an intangible property interest), does not constitute money paid out as a result of racketeering activity, and is more in the nature of personal injuries which are not compensable under RICO.[7]

Another separate reason why review should be denied is because the petitioners failed properly to allege that any injuries to their property were proximately caused by the racketeering acts, as opposed to other state-law torts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985) (plaintiff has standing only if he has been injured in his business or property *by* the conduct constituting the violation). Although this reason was not relied upon by the *en banc* decision of the court of appeals, it is an additional ground for denying review.

RICO was never intended to provide a remedy for every misdeed committed in a residential neighborhood. It does not provide a remedy for unneighborly conduct which might constitute a basis for a nuisance claim under state law. It provides compensation only for damages proximately caused by racketeering activities. The third amended complaint does not allege RICO type injury in that it does not allege that either petitioner was "injured in his business or property" within the meaning of 18 U.S.C. § 1964(c) as a proximate result of respondent's conduct. There is no allegation that respondent's alleged acts were directed at the petitioners or intended to disrupt the quiet enjoyment of their apartments and carport.

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[6] Oscar Pet. 27a(n)4.

[7] Oscar Pet. 23a-25a.

There is no indication that Congress intended to convert state nuisance actions into treble damage racketeering suits in federal court. Although petitioners may have been "injured" in some sense under state law, even if that injury was substantial, this Court recognized that 18 U.S.C. § 1962 was not intended by Congress "to allow all factually injured plaintiffs to recover. . . ." *Holmes v. SIPC*, ____ U.S. ____, 117 L. Ed. 2d 532, 543 (1992). At most, petitioners have suffered only an indirect injury, and allowing their suit "would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.' " *Id.* at 548 (quoting *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983)).

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be denied.

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San Francisco, CA

Respectfully submitted,

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